IN THE

Supreme Court of the United States

October Term, 1954

No. 10, ORIGINAL

STATE OF ARIZONA,

v. *Complainant*

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA. *Defendants*

UNITED STATES OF AMERICA, INTERVENER.

STATE OF NEVADA, INTERVENER.

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RESPONSE OF COMPLAINANT STATE OF ARIZONA TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

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RESPONSE OF COMPLAINANT STATE OF ARIZONA TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

The Complainant, State of Arizona, by its duly authorized Attorneys, respectfully submits its response to the motion by Defendants to join as parties the States of Colorado, New Mexico, Utah and Wyoming.

1.

Responding to Paragraph 1 of said motion, Complainant admits that the four States of Colorado, New Mexico, Utah, and Wyoming are parties to the Colorado

River Compact, and admits that the State of Nevada sought leave to intervene in this case as a party, which motion was granted.

Complainant admits that the construction and interpretation of portions of the Colorado River Compact affecting the Lower Basin only are in controversy in the present case, but denies that any decree determining the meaning and effect of that Compact considered as a contract cannot be fully effective in the absence of the other States who are not presently parties to this litigation.

Complainant denies that the principal issues and interpretation of the Colorado River Compact are as stated in Defendants' Exhibit A, Summary of the Controversy, appended to said motion, which Exhibit is incorporated as a part of said motion. Complainant alleges that the true issues involved in the controversy are as hereinafter set forth, and in the other pleadings filed by Complainant.

2.

Complainant admits that the States of New Mexico and Utah are States of the Upper Division, as well as States which are, in part, within the Lower Basin, as those terms are defined by the Colorado River Compact. Complainant admits that Nevada sought leave to intervene, which motion was granted.

Complainant denies that the States of New Mexico and Utah are indispensable parties to a full resolution of a controversy between Complainant and Defendants.

Further responding to Paragraph II of said motion, Complainant denies all of the allegations thereof, except as admitted in this response, or in the other pleadings filed herein by Complainant.

3.

Responding to Paragraph III of said motion, Complainant denies all of the allegations thereof, except as admitted in this response or in the other pleadings filed herein by Complainant.

Complainant specifically denies the existence of a "Statutory Compact" between the United States and California or any compact precluding the State of Arizona from ratifying the Colorado River Compact, as alleged in Paragraph 13 of the Bill of Complaint.

4.

Responding to Paragraph IV of said motion, Complainant denies the allegations thereof, except as admitted in this response, or in other pleadings filed by Complainant.

5.

Responding to Paragraph V of said Motion, Complainant denies the joinder of the States of Colorado, New Mexico, Utah, and Wyoming is justified by the records, files and pleadings herein, and denies that such States are indispensable parties to a decree in this case. Complainant further denies that the States of Colorado, New Mexico, Utah and Wyoming, as States of the Upper Division, or as States of the Upper Basin, as defined by the Colorado River Compact, are proper, necessary or indispensable parties to this action. Further answering Paragraph V of said Motion Complainant alleges that the States of New Mexico and Utah, as States of the Lower Basin, have not made any application to intervene in this action and further alleges that they are not necessary or indispensable parties to any decree that may be entered herein. (See Nebraska vs. Wyoming, 295 U.S. 40 at Page 43) Com-

plainant further alleges that the only interests which the States of New Mexico or Utah, as States of the Lower Basin, might have in this litigation are as set forth in this Response, the Analysis of the Summary of the Controversy appended hereto and marked Exhibit 1, and the other pleadings filed by Complainant herein.

Complainant, as heretofore admitted, alleges that the State of Nevada, as a Lower Basin State, filed a motion for leave to intervene in this action, which motion has been granted by the Court, and Complainant further alleges that neither the States of New Mexico nor Utah, as States of the Lower Basin nor the States of Colorado, New Mexico, Utah or Wyoming, as States of the Upper Basin, or as States of the Upper Division, have moved to intervene in this action, and such States do not desire to become parties to this action and have indicated that they will resist this motion, as hereinafter alleged in Paragraph 13 hereof.

6.

Complainant alleges that this litigation involves only the right to the use of the waters of the Colorado River System after the same have passed Lee Ferry, Arizona, or which originate on tributaries in the Lower Basin. None of the parties to the action has questioned the right of the Upper Basin States to the beneficial consumptive use of 7,500,000 acre-feet of the waters of such system per annum as apportioned to the Upper Basin by the Colorado River Compact, subject to the obligations and burdens imposed by Article III (c) and Article III (d) of said Compact.

Complainant further alleges that although a majority of the waters of the Colorado River System are developed in the Upper Basin States, and the system drains a considerable area therein, this fact does not make

such States indispensable parties in an action to determine rights to use of waters below Lee Ferry, Arizona, the dividing point between the Upper and the Lower Basins.

7.

Complainant alleges that the principal uses by the State of New Mexico of Lower Basin waters are from the Gila River and its tributaries in New Mexico. Complainant further alleges that such uses are governed and controlled by a decree of the United States District Court for the District of Arizona, and such uses cannot be extended or increased without a modification of said decree.

8.

Complainant alleges that the only uses of waters from the Colorado River System by the State of Utah in the Lower Basin are on the Virgin River within that State, and the Complainant is presently engaged in negotiating a compact with that State respecting such uses, and that there is no dispute existing between Complainant and the State of Utah.

9.

Complainant alleges that in Section 7 (g) of the contract between Arizona and the United States, dated February 9, 1944, the full text of which appears as Exhibit C in the Bill of Complaint, Complainant expressly recognizes the rights of New Mexico and Utah to an equitable share of the waters apportioned by the Colorado River Compact to the Lower Basin, and also waters unapportioned by such Compact.

The Complainant further alleges that in its Bill of Complaint it recognizes the rights of the States of Utah and New Mexico to waters of the Lower Basin.

In its Bill of Complaint Complainant set forth three basic issues which must be determined as follows:

(a) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?

(b) How is the beneficial consumptive use of water in the Lower Basin to be measured?

(c) How are evaporative losses from Lower Basin main-stream reservoirs to be charged?

Defendants have raised three additional questions; namely,

(a) Is Arizona a party to, and bound by, the Colorado River Compact?

(b) May Arizona place reliance upon and receive benefits under the California Limitation Act?

(c) The relative priorities of contracts between the United States and water users in the Lower Basin.

A determination of these questions can have no effect upon the States of Colorado, New Mexico, Utah, and Wyoming.

11.

As of October 11, 1948 the five Upper Basin States as defined by the Colorado River Compact, executed the Upper Colorado River Basin Compact. By said Compact the States of the Upper Basin:

(a) Apportioned the waters available to that Basin under the Colorado River Compact.

(b) Defined beneficial consumptive use in terms of man-made depletions as contended for by Complainant.

(c) Recognized the obligations imposed upon the States of the Upper Division by Article III of the Colorado River Compact, including the obligation to refrain from depleting the flow of the river at Lee Ferry below an aggregate of 75 million acre-feet for any period of ten consecutive years.

(d) Determined how reservoir losses should be charged in the Upper Basin.

(e) Agreed that the consumptive use of water by the United States of America or any of its agencies, instrumentalities, or wards shall be charged as a use by the State in which the use is made.

12.

The Upper Colorado River Basin Compact has been duly approved by the Legislatures of each of the Upper Basin States, and by the Congress of the United States. By the execution of such Compact the States of the Upper Basin have resolved and settled any differences or disputes which may, at any time, have existed among them, and any decision by this Court dealing solely with waters of the Colorado River System below Lee Ferry cannot, in any manner, affect the States of Colorado, New Mexico, Utah, and Wyoming.

13.

This action was commenced on August 13, 1952, when Complainant filed its Motion For Leave To File Bill of Complaint and Bill of Complaint, which motion was granted on January 19, 1953. Since that date Defendants have filed numerous and voluminous pleadings in this cause, and the present motion to join as parties the States of Colorado, New Mexico, Utah, and Wyoming is only dilatory in nature, and designed to prolong this controversy.

Any delay in determination of the issues in this case can benefit only the State of California and water users therein, since facilities for the diversion of water of the Colorado River System for use in California have already been constructed with a capacity far in excess of the 4,400,000 acre-feet per annum authorized by Boulder Canyon Project Act and California Limitation Act. Defendants are admittedly increasing their uses annually, and will thereby attempt to establish rights to the use of the Colorado River System water to the detriment of the other States within that river basin, and particularly, Complainant State of Arizona.

If the aforementioned States are made parties to this litigation, such action will seriously interfere with, and perhaps prevent, the enactment of S. 1555, a measure now pending before the Congress of the United States to authorize the Upper Basin Storage Project.

The Upper Colorado River Commission, an Interstate Administrative Agency, duly created by Article VIII of the Upper Colorado River Basin Compact, has adopted a resolution finding that the Upper Division States are ~~not indis~~pensable parties in this action, and recommending that none of them seek leave to intervene herein, and that each resist any effort to be joined in this case.

On numerous occasions representatives of the State of California, and various other defendants herein, have stated that the only three points of dispute between Arizona and the Defendants are those set forth in the Bill of Complaint; some of such statements are as follows:

Excerpt from letter of Governor Earl Warren to Hon. Joseph C. O'Mahoney, Chairman, Senate Committee on Interior and Insular Affairs, in the Hearings before the Committee on Interior and Insular Affairs

of the United States Senate on S.75 and S.J.Res.4, in March, April and May, 1949, at Page 915 thereof:

"... The future economic development of the lower-basin States is dependent upon a solution of the existing controversy. The Secretary of the Interior has recognized the necessity of a determination of the controversy in order to permit further development of the water resources of the Colorado River by the Federal Government.

Since the major issues of the controversy are matters of law and not of fact, it is probable that within a comparatively short time the Court could hear legal arguments, without the necessity of taking extended evidence regarding facts, and adjudicate the rights of the affected States promptly. I believe the case could be presented to the Court on an agreed statement of facts. Each year that the settlement of the controversy is delayed means additional years of delay in the development of the areas affected by the use of Colorado River water."

Of similar import are:

A letter dated May 8, 1948 written by Governor Warren to Hon. Clifford P. Case, Chairman of the House Judiciary Sub-Committee, as contained in Hearings before Sub-Committee No. 4 of the Committee of the Judiciary House of Representatives on H.J. Res. 225, 226, 227, 236 and H.R. 4097 in May of 1948 at Page 5 thereof:

"... I am convinced that the litigation can be conducted and concluded within a brief time, because the essential issues between the States are legal in character, and do not involve interminable examination of factual evidence. I believe the case could be presented to the Court on an agreed statement of facts. To the end that there may be a speedy determination of the case, I am willing to undertake that in the event the Congress authorizes the suit, the proceedings on

California's part will be carried on with all possible promptness."

On the same page of the above hearings immediately following the letter to the Hon. Clifford P. Case, is another letter written by Governor Warren to Governor Sidney P. Osborn, Governor of Arizona, dated March 5, 1947. In this latter letter Governor Warren first urges that the controversy be arbitrated, and if arbitration is not possible or feasible, that:

"... I propose that we join in requesting Congress to authorize a suit to determine our rights in the Supreme Court of the United States, which suit could, if agreeable to the States, be submitted on an agreed statement of facts."

Mr. Northcutt Ely, Assistant Attorney General, appearing for Defendant State of California, in testifying in Hearings before Sub-Committee No. 4 of the Committee on the Judiciary of the House of Representatives on H.J. Res. 225, 226, 236 and H.R. 4097 in May of 1948, at Page 32 thereof said:

"... We believe the questions required to be presented to the Supreme Court in this matter are all questions of law, interpretation of statutes, compacts, and documents of which the Court would take judicial notice, and that no protracted case or hearing shall be involved, of the character of which the committee has probably heard or may be familiar, with respect to Kansas v. California, (sic), or Wyoming v. Colorado, and the other long-drawn-out adjudication cases."

Again, Mr. Ely testifying before the same Committee in the same report, on Page 93 thereof said:

"We feel that the decision can be obtained within a reasonable time, within 1 or 2 years at the most; that the taking of protracted testimony will not be required and that the submission of this case to the Court will advance the cause of the development of the Colorado River. We see no advantage in delay."

Nothing is gained by risking these great works without a decision. The decision is inevitable. The day of shortage must come; let the decision be made before new works are built, not after."

Again, Mr. Ely, testifying at the same hearing (testimony appearing on Page 94) in answer to a question propounded by Mr. Case, Chairman of the Committee, said:

"Mr. Chairman, if the Court should resolve the questions of interpretation involved in these three points, the engineers may very readily calculate the quantities of water available for each State under them if the rules are once laid down by the Supreme Court. The engineers can apply them without particular difficulty."

Also note Mr. Ely's testimony, appearing on Page 35 of Hearings before a Subcommittee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress on S.J. Res. 145, May 10-14 inclusive, 1948:

"As far as California is concerned, the issues which must necessarily be litigated are the three which are directly translatable into large quantities of water: The issue of consumptive use versus depletion; the status of the waters referred to in Article III (b) of the compact, and the issue of the accountability for reservoir losses. All of these are matters of statutory construction or of contract law insofar as the California Limitation Act constitutes a contract between the Congress and the Legislature of California. None of them presen t issues of fact or require the taking of testimony. California pledges her energies to an expeditious conclusion of the case."

Of like import there is testimony of Mr. Ely given before various Committees of Congress on Hearings on the Central Arizona Project Bill, S.75, and the so-called Suit Resolutions. Again and again Mr. Ely has

taken this same position, to wit; The only questions involved in this controversy are questions of law that can be determined by the Court without the necessity of the taking of any testimony whatsoever and that they are susceptible of an early determination.

The same position was taken by Mr. Arvin B. Shaw, Jr., Assistant Attorney General of California, in a brief filed by Mr. Shaw, Fred M. Hauser, Attorney General of California, and Allen Bible, Attorney General of Nevada, in Hearings on S.J. Res. 145 before a Sub-Committee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress, May, 1948 at Page 69. Quoting from that brief:

> "From the foregoing review of major issues, it is plain that the matters in controversy between Arizona and California are characteristically legal issues, being matters of interpretation of statutes and other documents. The ordinary factual elements, relating to quantities and time of flow and use, which characterize most water litigation are not to any substantial extent erifical factors.
>
> It is true that some of the classic interstate water cases, such as Kansas v. Colorado (206 U.S.46); Wyoming v. Colorado (259 U.S.419), and Nebraska v. Wyoming and Colorado (325 U.S.589), have required 10 years or more to reach adjudication. This has occurred because in each of these cases it was necessary for the court to appoint a master to take voluminous testimony relative to factual issues. In the case at bar it is not considered that a master need be appointed, nor that factual testimony be taken. The issues which are significant as between California and Arizona can be adjudicated, upon briefs and oral argument, within a reasonable time, not to exceed 2 to 3 years."

Mr. James H. Howard, Chief Counsel for Defendant Metropolitan Water District of Southern California, testifying before the Sub-Committee of the Committee

on Interior and Insular Affairs of the United States Senate, 80th Congress, on S.J. Res. 145, Page 105, said:

> "... It will not be necessary, in the proposed litigation, to determine any factual issues. Both Arizona and California use the same basic water-supply figures as determined by the United States Bureau of Reclamation and the United States Geological Survey. The differences between the States arise out of the application of the contract documents referred to, as they affect the distribution between the States, of water available for use in the lower basin."

Again, Mr. Howard, testifying before the Sub-Committee of the Committee on Interior and Insular Affairs of the United States Senate, 80th Congress, on S.J. Res. 145, on page 120, in answer to a question by Senator O'Mahoney as to whether any of the other basin states would be involved, stated:

> "So far as California is concerned, I think the answer is 'No'. We have no controversy with any of the upper basin States that requires any judicial examination. Both Arizona and California concede that Nevada should have 300,000 acre-feet, and a fraction of excess or surplus, whatever it is, set up in their contracts. So that the real battle is between Arizona and California."

And again, on the same page, in reply to another question by Senator O'Mahoney, Mr. Howard stated:

> "As Mr. Ely said a few minutes ago, so far as California is concerned, we would be willing to submit the case to the court on a stipulation just calling for the interpretation of those three issues."

These are but a few of the many instances in which officials and representatives of Defendants, particularly Defendant State of California, have urged a submission of this controversy to the Supreme Court in order that it might be determined and have stated that such controversy could be acted on by the Court without

the necessity of taking any factual evidence and that such controversy involved only the three questions of law that Complainant in its Complaint asked the Court to resolve, to wit:

1. Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?
2. How is the beneficial consumptive use of water apportioned by the Compact to be measured?
3. How are evaporation losses from Lower Basin main-stream reservoirs to be charged?

WHEREFORE, Complainant prays that the Motion of Defendants to Join, as Parties, the States of Colorado, New Mexico, Utah, and Wyoming, be denied.

Respectfully submitted,

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EXHIBIT I.

ANALYSIS OF SUMMARY OF CONTROVERSY SET FORTH AS EXHIBIT A TO DEFENDANTS' MOTION TO JOIN AS PARTIES THE STATES OF COLORADO, NEW MEXICO, UTAH, AND WYOMING.

As Exhibit A to the foregoing motion Defendants have appended a so-called "Summary of the Controversy"; an analysis of this summary discloses the questions raised by the Defendants are primarily questions of law, immaterial to the determination of the issues presented in the pleadings, and can have no effect whatsoever upon the States of Colorado, New Mexico, Utah, and Wyoming. Complainant will analyze the various questions raised under the same headings as presented in the "Exhibit A" to the motion.

I. The Quantities of Water in Controversy

Under this heading Defendants have set forth what they claim to be the quantity of water sought by the various parties to this action. The sole question involved is a definition of "beneficial consumptive use". This is purely a legal question affecting only the States of the Lower Basin, since the Upper Basin States have, by the Upper Colorado River Compact, agreed that this phrase should be defined in terms of man-made depletions.

II. Ultimate Issues

Under this heading Defendants have attempted to set forth what they consider to be ultimate issues involved in this action. None of the statements made, or the questions propounded, can have any effect whatsoever upon the States of Colorado, New Mexico, Utah, and Wyoming.

The United States

As far as the Upper Basin States are concerned, all of the matters raised by Defendants under this subheading have been settled and resolved by Article VII of the Upper Colorado River Basin Compact, wherein it was agreed that the consumptive use of water by the United States of America, or any of its agencies, instrumentalities, or wards, shall be charged as a use by the State in which the use is made.

Arizona

The question of Arizona's right to quiet title to 3,800,000 acre-feet per annum of the beneficial consumptive use of waters of the Colorado River Water System, subject to the availability thereof under the Colorado River Compact, the Boulder Canyon Project Act, and the California Limitation Act, cannot, in any manner, affect the States of Colorado, New Mexico, Utah, and Wyoming, since Arizona's claims are based solely on waters of the River System below Lee Ferry, Arizona. Any dispute between Arizona, California, and Nevada as to waters below Lee Ferry cannot, in any manner, involve the States of Colorado, New Mexico, Utah, and Wyoming.

California

The validity and enforceability of the contracts between the United States and the Defendants' public agencies of California for the storage and delivery of water requires only an interpretation of those contracts and related documents. Such contracts are for the delivery of water from storage in Lake Mead below Lee Ferry, Arizona, and cannot involve any of the States of the Upper Division.

Nevada

The claims of the State of Nevada relate only to waters of the Colorado River Water System apportioned to the Lower Basin, and a determination of such claims cannot, in any way, affect the States of the Upper Division.

Interests of Other States

The principal issues presented by the pleadings heretofore filed herein are as follows:

(a) Is the water referred to and affected by Article III (b) of the Colorado River Compact apportioned or unapportioned water?

(b) How is the beneficial consumptive use of water in the Lower Basin to be measured?

(c) How are evaporative losses from Lower Basin main-stream reservoirs to be charged?

(d) Is Arizona a party to, and bound by, the Colorado River Compact?

(e) May Arizona place reliance upon and receive benefits under the California Limitation Act?

(f) The relative priorities of contracts between the United States and water users in the Lower Basin.

As heretofore pointed out, none of these issues can affect the States of Colorado, New Mexico, Utah, and Wyoming. Certainly these states have no interest in the waters apportioned by Article III (b) of the Colorado River Compact since that apportionment was expressly made to the Lower Basin. By the Upper Colorado River Compact the aforementioned States have agreed that the term "beneficial consumptive use" is to be measured by man-made depletions, and they have also agreed how reservoir losses are to be charged in the Upper Basin.

Whether Arizona is a party to, and bound by, the Colorado River Compact does not concern the aforementioned States since they have all ratified such Compacts and are bound thereby. Whether Arizona may rely upon the California Limitation Act is immaterial in respect to Defendants' motion since the States of Colorado, New Mexico, Utah, and Wyoming are expressly named as beneficiaries in such Act. The relative priority of the various contracts between the United States and water users in the Lower Basin do not concern the States in question since such contracts deal solely with waters in the River System below Lee Ferry, Arizona.

III. Factual Issues

None of the issues raised under this sub-heading concern the States of Colorado, New Mexico, Utah, and Wyoming, since they relate to waters of the Lower Basin, or to questions which have been resolved and agreed upon in the Upper Colorado River Basin Compact.

IV. The Issues of Interpretation of the Colorado River Compact, the Boulder Canyon Project Act, the Statutory Compact, and the Mexican Water Treaty

All of the questions raised by Defendants under this sub-heading are purely legal in character. This is obvious from the very language used in the sub-heading itself. These questions can be resolved and determined by an interpretation and construction of the various documents mentioned, and such interpretation can, in no way, involve the States of Colorado, New Mexico, Utah, and Wyoming.